Soo Shiok Liong v Pendakwa Raya

HIGH COURT (PENANG) — CRIMINAL APPLICATION NO 44–16–93
VINCENT NG JC
12 APRIL 1993

Criminal Procedure *— Bail — Quantum of bail — Factors to be considered when deciding on quantum*

Criminal Procedure *— Bail — Quantum of bail — Discretionary in nature — Trial judge did not apply mind to primary consideration when granting bail — Whether superior court could interfere*

The applicant was charged in the sessions court under s 108 of the Penal Code (FMS Cap 45) for abetting 13 offences of criminal breach of trust involving a total sum of RM5m. The sessions court judge set bail at RM1m in two sureties but did not note his grounds for setting the amount of bail as such. The applicant was remanded because he could not raise the bail. He applied to the High Court for reduction in the amount of the bail. The application was supported, inter alia, by a certificate of urgency issued by the applicant's counsel in which counsel stated one of the grounds of urgency to be that the applicant was not in good health and that any delay in his release would further affect his health. This statement had not been confirmed by way of affidavit evidence from the applicant at the time when the application was first to be heard, although he did say in an affidavit later that his health had been affected by the treatment that he had received whilst in detention. The application was also supported by an affidavit affirmed by the applicant in which he had falsely said that he had never been charged for any offence involving dishonesty, cheating or breach of trust.

Held, reducing the amount of bail to RM600,000:

(1) In all cases where the jurisdiction is of a discretionary nature, the High Court will be slow to interfere unless it appears that the learned judge at first instance, in arriving at his decision, had acted on some wrong principle. In the present case, the records were devoid of any indication of the principles, if any, that the learned judge had adopted.

(2) The learned judge gave no indication that in setting the quantum of bail he had applied his mind to the primary consideration in deciding the issue, being the securing of the attendance of the applicant at the trial, and in particular that the amount imposed would not be excessive but be sufficient to secure the attendance of the applicant. Therefore, the amount of RM1m set by the learned judge would appear to be an arbitrary figure and contrary to the requirements under the provisions of s 389 of the Criminal Procedure Code (FMS Cap 6) ('the Code').

(3) The factors for consideration in setting the amount of bail were: (a) the nature and severity of the offence and the severity and degree of punishment which conviction might entail; (b) the quantum should be higher in the case of non-bailable offences; (c) an excessive quantum may defeat the granting of bail as the accused may find difficulty in getting a bailor acceptable to the court; (d) the accused is presumed to be innocent until proven guilty; (e) whether there is a likelihood of the applicant absconding if the bail quantum is set too low; (f) bail is not intended to be punitive but only to secure the attendance of the accused; (g) the surrender of the accused's international passport should go to reducing the quantum of bail; (h) the fact that the applicant had presented himself at the police station and had co-operated with the police should also go to abating the quantum of bail; (i) the quantum of bail should not be set so prohibitively high as to have the effect of incarcerating the accused before he is convicted of the crime; and (j) the application of the court's mind in considering the above factors ought to be reflected in the judge's records. Here, the court was of the view that the bail of RM1m had the unfortunate effect of punishing the applicant before he was proven guilty of the charges against him.

Per curiam:

(1) Considering that it has now become a common practice for counsel to file certificates of urgency in criminal as well as civil cases without sufficient justification, courts would have to be concerned to ensure the authenticity of such claims of urgency by counsel. That facility had been abused by the counsel here.

(2) While there was no obligation placed on counsel, when preparing affidavits, to verify the truth of statements affirmed by their clients in their affidavits, it is nevertheless the duty of counsel, as officers of the court, to desist from being party to the inclusion in such affidavits of statements that they ought to or are in the position to know to be untrue. Such conduct by counsel would be dishonest and unbefitting within the meaning of the strictures contained in s 93(2)(b) of the Legal Profession Act 1976.

[Bahasa Malaysia summary

Pemohon telah didakwa di mahkamah sesyen di bawah s 108 Kanun Keseksaan (FMS Bab 45) atas tuduhan bersubahat dalam melakukan 13 kesalahan pecah amanah jenayah meliputi sejumlah RM5 juta. Hakim mahkamah sesyen telah menetapkan jaminan pada RM1 juta dengan dua penjamin tetapi tidak merakamkan alasannya bagi menetapkan jumlah jaminan itu seperti yang telah ditetapkan. Pemohon telah ditahan kerana beliau tidak dapat menyediakan jaminan itu. Beliau telah memohon kepada Mahkamah Tinggi untuk pengurangan jumlah jaminan itu. Permohonan itu disokong, antara lainnya, oleh satu sijil kecemasan yang dikeluarkan oleh peguambela pemohon. Di

dalam sijil itu, peguambela menyatakan salah satu daripada alasan kecemasan sebagai kesihatan pemohon yang tidak baik dan bahawa sebarang kelengahan dalam pembebasannya akan menjejaskan kesihatannya. Kenyataan ini tidak ditentusahkan oleh keterangan afidavit daripada pemohon pada masa apabila permohonan itu mula-mula patut didengar, biarpun beliau mengatakan di dalam satu afidavit kemudiannya bahawa kesihatannya telah terjejas akibat perlakuan yang telah diterimanya semasa beliau berada dalam tahanan. Permohonan itu juga disokong oleh satu afidavit yang diakusah oleh pemohon dalam mana beliau menyatakan dengan palsu bahawa beliau tidak pernah didakwa untuk sebarang kesalahan yang meliputi ketidakjujuran, penipuan atau pecah amanah.

Diputuskan, mengurangkan jumlah jaminan itu ke RM600,000:

(1) Dalam semua kes di mana bidang kuasa adalah dalam bentuk budibicara, Mahkamah Tinggi akan bertindak secara perlahan sebelum bercampur tangan melainkan ianya kelihatan bahawa hakim di pendengaran tahap pertama, ketika membuat keputusannya, telah bertindak atas prinsip yang salah. Di dalam kes ini, nota-nota tidak menunjukkan sebarang prinsip, jika ada, yang telah dipakai oleh hakim itu.

(2) Hakim yang arif tidak memberikan petanda bahawa dalam menetapkan jumlah jaminan itu beliau telah mengarahkan fikirannya kepada pertimbangan utama dalam memutuskan isu itu, iaitu untuk menjamin kehadiran pemohon di perbicaraan, dan khususnya bahawa jumlah yang dikenakan tidaklah keterlaluan tetapi harus mencukupi untuk menjamin kehadiran pemohon. Lantaran itu, jumlah RM1 juta yang ditetapkan oleh hakim yang arif nampaknya satu jumlah yang ditetapkan secara sebarangan dan adalah bertentangan dengan kehendak di bawah peruntukan s 389 Kanun Acara Jenayah (FMS Bab 6) ('Kanun itu').

(3) Faktor-faktor yang patut dipertimbangkan ketika menetapkan jumlah jaminan adalah: (a) jenis atau berapa teruk kesalahan itu dan berapa teruk serta takat hukuman yang akan dibawa oleh satu sabitan; (b) jumlah jaminan haruslah lebih tinggi dalam kes kesalahan-kesalahan yang tidak boleh dijamin; (c) jumlah yang terlalu tinggi boleh menjejaskan tujuan jaminan kerana si tertuduh mungkin menghadapi kesusahan dalam mendapatkan seorang penjamin yang akan diterima oleh mahkamah; (d) si tertuduh dianggap tidak bersalah sehingga dibuktikan bersalah; (e) sama ada terdapat apa-apa kemungkinan bahawa pemohon akan melarikan diri jika jumlah jaminan adalah terlalu rendah; (f) jaminan tidak mempunyai tujuan menghukum tetapi cuma bertujuan menjamin kehadiran si tertuduh; (g) penyerahan pasport antarabangsa si tertuduh patut membawa satu pengurangan jumlah jaminan; (h) hakikat bahawa pemohon telah menyerahkan dirinya di balai polis dan telah bekerjasama dengan polis juga patut mengurangkan jumlah jaminan; (i) jumlah jaminan tidak patut ditetapkan begitu tinggi sehingga membawa kesan memenjarakan

si tertuduh sebelum beliau disabitkan atas kesalahan itu; dan (j) penggunaan fikiran mahkamah dalam mempertimbangkan faktor-faktor di atas patut ditunjukkan di dalam nota hakim itu. Di sini, mahkamah berpendapat bahawa jaminan sebanyak RM1 juta mempunyai kesan malang menghukum pemohon sebelum beliau telah dibuktikan bersalah atas tuduhan terhadapnya.

Per curiam:

(1) Memandangkan yang ianya telah menjadi amalan yang umum pada masa ini bagi peguambela memfailkan sijil kecemasan dalam kes-kes jenayah dan sivil tanpa alasan yang mencukupi, mahkamah sepatutnya harus berwas-was menentukan kebenaran dakwaan kecemasan oleh peguambela. Kemudahan itu telah disalahgunakan oleh peguambela dalam kes ini.

(2) Walaupun tidak ada obligasi yang diletakkan ke atas peguambela, semasa menyediakan afidavit, untuk menentukan kebenaran kenyataan yang diakusah oleh anak guaman mereka dalam afidavit itu, namun ianya adalah tugas peguambela, sebagai pegawai mahkamah, untuk menahan daripada menjadi pihak kepada pemasukan dalam afidavit itu kenyataan-kenyataan yang boleh diketahui oleh mereka sebagai tidak benar akibat kedudukan mereka. Kelakuan sedemikian oleh peguambela adalah tidak jujur dan tidak berpatutan mengikut maksud sekatan yang terkandung di dalam s 93(2)(6) Akta Profesion Undang-Undang 1976.]

Notes

For cases on the granting of bail, see 5 *Mallal's Digest* (4th Ed) paras 494–506.

Cases referred to

1 *Lim Kiap Khee v PP* [1988] 1 MLJ 198 (refd)
2 *PP v Dato' Mat @ Mat Shah bin Safuan @ Ahmad* [1991] 2 CLJ 1112 (refd)
3 *Goh Beow Yam v R* [1956] MLJ 251 (refd)
4 *PP v Wee Swee Siang* [1948] MLJ 114 (refd)
5 *Che Su bte Daud v PP* [1978] 2 MLJ 162 (refd)
6 *Chinnakarappan v PP* [1962] MLJ 234 (refd)
7 *Zulkifflee bin Hj Hassan v PP* [1987] 2 MLJ 527 (refd)
8 *R v Rose* (1898) Cox CC 717; (1895–9) All ER 350 (refd)
9 *Low Chit Bah v PP* [1986] 1 MLJ 297 (not folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 389

Ang Chun Pun (*CP Ang & Co*) for the applicant.
Salim Soib (Deputy Public Prosecutor) for the public prosecutor.

Vincent Ng JC: This is an application by notice of motion for a reduction of the amount of RM1m in two sureties, which was imposed by the Sessions

Court, Butterworth in respect of arrest case no 62–(45–69)–93. The application is supported by affidavits of the applicant (encls 3 & 5) and a certificate of urgency (encl 4) by his counsel Mr Ang Chun Pun. The public prosecutor filed an affidavit-in-reply affirmed by the acting deputy superintendent of police (encl 6) who was the investigating officer of the said arrest case.

The applicant and another was charged in the sessions court on 13 March 1993 with 13 charges under s 108 of the Penal Code (FMS Cap 45) for abetting 13 offences of criminal breach of trust under s 409 of the Penal Code (FMS Cap 45) allegedly committed by one Baharudin Shah bin Che' Sat. The 13 charges being for non-bailable offences in respect of an aggregate sum of RM5m more or less.

The question of bail was considered after the plea was recorded. According to the copy of the record of proceedings obtained by my senior assistant registrar, the DPP Encik Zainal Adzam told the court below that he had no objection to bail being granted to the applicant and had suggested the bail bond be set at RM1m in two sureties, conditional upon his surrender to the court, of all travel documents of the applicant; presumably including the international passport of the applicant.

Mr CP Ang then asked the court to reduce the amount of bail suggested by Encik Zainal on the grounds that:

(a) the applicant had co-operated with and surrendered himself to the police;
(b) RM1m is excessive and the accused cannot raise that bail;
(c) the accused would thus be unable to better prepare his case which involved a lot of documentary evidence; and
(d) he suggested that bail of RM200,000 would be sufficient to secure the accused's presence as his international passport had already been impounded by the police.

The learned sessions court judge accepted the learned DPP's suggestion and set bail at RM1m in two sureties. He also ordered that the international passport of the applicant be surrendered to the court as a condition of granting bail. Quite correctly, the court did not impound the applicant's international passport. This the court is not empowered to do under s 388 of the Criminal Procedure Code (FMS Cap 6) ('the Code'), though it may set certain conditions to granting of bail. See *Lim Kiap Khee v PP*[1] and *PP v Dato Mat @ Mat Shah bin Safuan @ Ahmad.*[2]

Before I deal with the question in issue it may not be amiss for me to consider two side issues which may be pertinent to legal practitioners and which concerns the applicant's counsel.

The application was heard upon a certificate of urgency (encl 4) signed by the applicant's counsel. One of the two grounds of urgency stated by him was that his client's health was not good and any delay in his release would further affect his health. The other being the fact of his detention. I note with regret that there is no mention of the state of the applicant's health even by the applicant himself in his supporting affidavit (encl 3), though he did make a feeble attempt ex post facto in his subsequent affidavit to mention something about his health being affected by the treatment while in detention.

As such, this court wish to express its concern that, from the records as it stood (when this application was originally fixed for hearing) it would appear that the facility afforded by the provision for prompt disposal of applications upon certificates of urgency, had been abused by counsel here. Counsel's attention was also drawn to the court's displeasure regarding this at the first hearing of this application on 23 March 1993. Considering that it has now become a common practice for counsel to file certificates of urgency in criminal as well as civil cases without sufficient justification, courts would have to be concerned to ensure the authenticity of such claims of urgency by counsel.

Encik Zainal had also submitted that in para 9(d) of encl 5 the applicant had affirmed that he had never been charged for any offence involving dishonesty, cheating or breach of trust, whereas exh ZRA1 of the affidavit of the timbalan penguasa polis (encl 6) showed that the applicant had, even then, stood charged for an offence under s 411 of the Penal Code (FMS Cap 45) for receiving stolen property (the said earlier charge). Thus, the learned Mr Deputy said, the applicant had lied and had shown that he had treated the court with contempt; and counsel Mr CP Ang may also have acted for the applicant in that case. If so, he must have known of the blatant lie his client told when he drafted encl 5 for his client. This court is of the view that while there is no obligation placed on counsel, when preparing affidavits, to verify the truth of statements affirmed by their clients in their affidavits, it is nevertheless the duty of counsel, as officers of the court, to desist from being a party to the inclusion in such affidavits, statements that they ought to, or are in the position to know to be untrue. Such conduct by counsel would be dishonest and unbefitting within the meaning of the strictures contained in s 93(2)(b) of the Legal Profession Act 1976.

In the event, the court called for the records of the said earlier charge and was satisfied that M/s Sajali, Ameir & Partners but not CP Ang had acted for the applicant in the earlier charge. Even then, the manner in which para 9(d) of encl 5 was expressed, left much to be desired in terms of credibility of the deponent.

I now turn to consider the merits of the application of the client, the applicant himself.

In all cases where the jurisdiction is of a discretionary nature, the High Court will be slow to interfere unless it appears that the learned judge, in arriving at his decision, had acted on some wrong principle. See *Goh Bew Yam v R.*[3] In this case, the records are devoid of any indication of the principles, if at all, that the learned judge had adopted.

The matters for consideration in granting or refusing bail are as set out in *Mallal's Criminal Procedure* (4th Ed) at p 551 and the cases of *PP v Wee Swee Siang*[4] *and Che Su bte Daud v PP.*[5] In granting or refusing bail the court has quite clearly to apply its mind with the greatest care to all the aforesaid matters for consideration. See *Chinnakarappan v PP.*[6] The courts have always leaned in favour of admitting an accused person to bail. See *PP v Dato Mat @ Mar Shah bin Safuan @ Ahmad.*[2]

The present application does not however concern the granting or refusal of bail, as from the record I gather that the learned DPP had, in the court below, consented to the applicant being admitted to bail subject to conditions

as aforesaid. Thus, the matter for judicial determination here only concerns the correctness of the quantum set for bail by the learned judge of the sessions court.

No grounds or consideration appeared from the learned judge's records to justify the amount RM1m that he fixed for bail. He gave no indication that in setting the quantum of bail he had applied his mind to the primary consideration in deciding this issue, being the securing of the attendance of the applicant. He had thus failed to show that he had exercised his discretion judicially. In particular, he has to decide, having due regard to the circumstances of the case that the amount imposed would not be excessive but be sufficient to secure the attendance of the applicant. See *Zulkifflee bin Haji Hassan v PP*[7] and *R v Rose*.[8] This application of mind by the learned judge when fixing quantum of bail bond is required under s 389 of the Code in exercise of his discretion pursuant to s 388(1) of the Code, in as much as such application of mind is similarly required in his exercise of the discretion itself, under s 388(1) of the Code.

For the above reasons the RM1m set by the learned judge would appear to be an arbitrary figure and contrary to the requirements under the provisions of s 389 of the Code which states as follows:

> The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a Judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

The factors for consideration in setting the quantum of bail bond are as follows:

(1) The nature and gravity of the offence and the severity and degree of punishment which conviction might entail. This is only one of the relevant, but not overriding, factors to be considered. It is thus decidedly wrong to fix the quantum of bail bond solely on the basis of such quantum being in proportion to the value of the subject matter of the charge, in as much as such reckoning would eclipse the overriding concern that bail bond should not be excessive but only be sufficient to secure the attendance of the accused.

(2) The quantum should be higher in the case of non-bailable offences.

(3) An excessive quantum may defeat the granting of bail as the accused may find difficulty in getting a bailor acceptable to the court.

(4) The principle and basis of our criminal law is that the accused is presumed to be innocent until proven guilty.

(5) Whether there is a likelihood of the applicant absconding if the bail quantum is set too low. See *Low Chit Bah v PP*.[9]

(6) Bail is not intended to be punitive but only to secure the attendance of the accused at the trial; therefore the amount of the bond must be fixed with due regard to the circumstances and must not be excessive. See *R v Rose*.[8] The amount of bail may vary according to the circumstances even on similar value of the subject matter of the charge.

(7) His surrender of his international passport should go to reduce the quantum of bail. See *PP v Dato' Mat @ Mat Shah bin Safuan @ Ahmad*.[2]

(8) The fact that the accused had presented himself at the police station and had co-operated with the police should also go to abate the quantum of bail.

(9) The quantum of bail should not be set so prohibitively high as to have the effect of incarcerating the accused before he is convicted of the crime. See *Zulkifflee bin Haji Hassan v PP*.[7]

(10) Application of the court's mind in considering the above factors ought to be reflected in the judge's records.

The question for consideration in our instant case is whether bail of RM1m in two sureties is adequate or too excessive in the light of the circumstances herein. Applying the principles adumbrated above to the facts of this case, it appears to me that the bail of RM1m has the unfortunate effect of punishing the applicant before he is proven guilty of the charges against him. This is evident from the fact that he is unable to find the two sureties to secure such bail. As a result he has been on remand in prison from 20 February 1993 to date. The amount of money fixed by the court as bail is not the sole consideration to secure the attendance of an accused person in court. A wealthy accused may be too happy to deposit RM1m in court and then abscond from the country and does not attend the trial. On the other hand, a person of meagre means, who cannot raise bail of RM1m may be kept in the remand prison for months before his trial and in the end he may be found not guilty.

In considering the amount of bail bond the court below should have taken into consideration the circumstances peculiar to the case. The applicant has been co-operative with the police in their investigation. According to para 4 encl 5 and para 9 encl 3, the applicant had voluntarily visited the chief police officer at the Contingent Police Headquarters, Penang (and was indeed arrested) on 20 February 1993 when called to do so.

The learned DPP had submitted to the court below during the hearing of the bail-bond application that the gross value of the subject matter of all the 13 charges was in the region of RM5m. The applicant was also jointly charged with two others in respect of the same subject matter of loss of RM5m by a finance company through the criminal acts of the three of them. The quantum of the bail-bond of the two other accused persons were, according to the record, also fixed at RM1m each in two sureties which brings the grand total in respect of the three accused, charged on that day, to RM3m on a RM5m subject matter of the charge. If this method of reckoning was indeed employed by the learned judge of the sessions court — that is, the quantum being set on the basis 3/5 or 60% of the value of the subject matter of the charge — then such basis, as the sole basis of fixing quantum of bail bond, would not only be impermissible but would be manifestly excessive.

The case of *Low Chit Bah v PP*[9] is inapplicable here, as in that case there was affidavit evidence that the applicant, a Singapore citizen, had travelled

A on a forged Philippines passport, and under an assumed name of John L Santo; entering Singapore on three occasions.

Having weighed all the above considerations and having given them their proper weight, I am of the view that the quantum of bail in respect of the applicant should be reduced to RM600,000 in two sureties, conditional upon the surrender of the applicant's international passport to the court below.

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Order accordingly.

Reported by PS Ranjan

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